

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**IN RE:**

**KIMBERLY CHARLENE ZERBE,**

**Case No. 02-43401**

**Chapter 7**

**Debtor.**

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**KIMBERLY C. ZERBE,**

**Plaintiff,**

**vs.**

**Adversary No. 03-7027**

**SHIRLEY HOLDING,**

**Defendant.**

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**ORDER DENYING MOTION FOR DEFAULT JUDGMENT AND  
REQUIRING RESPONSE BY PLAINTIFF CONCERNING WHETHER  
THIS ADVERSARY PROCEEDING SHOULD BE DISMISSED**

This matter comes before the Court on a Motion for Default Judgment filed by Plaintiff, Kimberly Zerbe, the Debtor. Zerbe prays that this Court find that the mortgage interest held by Defendant Shirley Holding (hereinafter "Holding") in certain real estate located in Shawnee County, Kansas, is invalid under 11 U.S.C. § 506(a). Holding has failed to file an answer or other responsive pleading to the underlying Complaint to Determine Secured Status, although she did write a letter to the Court, *pro se*, generically asking the Court to preserve her mortgage.

Debtor's Complaint states that IndyMacBank holds the first mortgage on the house, but that the house is worth less than the amount due on the IndyMac mortgage, making Holding's second mortgage fully unsecured. Holding, by her default, admits the plaintiff's well-pleaded allegations of fact, but a non-answering defendant is not held to admit conclusions of law. *See Ryan v. Homecomings Financial*

*Network*, 253 F.3d 778, 780 (4<sup>th</sup> Cir. 2001). “A default is not treated as an absolute confession by the defendant of his liability and of the plaintiff’s right to recover.” *Id.*

Accordingly, this Court must analyze existing law to determine if Zerbe is entitled to a judgment that strips off, and thereby invalidates, Holding’s mortgage. The Court finds that the requested relief is not warranted under existing bankruptcy law, and the Motion must be denied.

The United States Supreme Court has rejected lien stripping in the Chapter 7 context when the lien at issue is undersecured. *Dewsnup v. Timm*, 502 U.S. 410 (1992). Although neither the Tenth Circuit Court of Appeals nor any other court in this Circuit appears to have published a decision on the issue presented herein—whether a totally unsecured junior mortgage can be stripped off in the Chapter 7 context—three Courts of Appeals have ruled on the issue. All three Circuits have held that the analysis in *Dewsnup* also applies to this fact pattern, and refused to strip off unsecured junior mortgages. *See In re Talbert*, 344 F.3d 555 (4<sup>th</sup> Cir. 2003) and *Allman v. Irvin Home Equity, Inc.*, 2003 WL 22284034 (6<sup>th</sup> Cir. 2003), *Ryan v. Homecomings v. Financial Network*, 253 F.3d 778 (4<sup>th</sup> Cir. 2003) and *Laskin v. First Nat’l Bank of Keystone (In re Laskin)*, 222 B.R. 872 (9<sup>th</sup> Cir. B.A.P. 1998).

This Court adopts the well-articulated reasoning in the decisions by the Circuit Courts of Appeals that have decided the issue, and holds that mortgage liens that are completely valueless cannot be stripped off in a Chapter 7 context.

The Complaint to Determine Secured Status (Doc. 1) asks the Court to “determine the validity of the claimed lien against [the Debtor’s] real estate under 11 U.S.C. § 506(a), for such other and any further relief as the Court deems just and equitable.” It appears that the Court’s ruling on the Motion for Default Judgment resolves all issues regarding the relief requested in the Complaint, because Debtor has not raised any other basis for questioning the validity of the mortgage, other than the lien stripping theory.

Plaintiff, Kimberly Zerbe, is therefore ordered to inform the Court on or before December 5, 2003, if any additional relief is sought in this case or if any additional issues remain unresolved that require this adversary proceeding to continue. If Ms. Zerbe fails to inform the Court that this adversary proceeding should continue, and provide the Court with the legal and factual bases justifying that position, by December 5, 2003, the Court will dismiss this adversary proceeding.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that Plaintiff Kimberly Zerbe's Motion for Default Judgment is denied.

**IT IS FURTHER ORDERED** that Plaintiff Kimberly Zerbe is to inform the Court on or before December 5, 2003, if any additional relief is sought in this case or if any additional issues remain unresolved that require this adversary proceeding to proceed, and the legal and factual bases justifying that position.

**IT IS FURTHER ORDERED** that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Federal Rules of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

Dated this \_\_\_\_ day of November, 2003.

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JANICE MILLER KARLIN, Bankruptcy Judge  
United States Bankruptcy Court  
District of Kansas

CERTIFICATE OF MAILING

The undersigned certified that copies of the ORDER DENYING MOTION FOR DEFAULT JUDGMENT AND REQUIRING RESPONSE BY PLAINTIFF CONCERNING WHETHER THIS ADVERSARY PROCEEDING SHOULD BE DISMISSED was deposited in the United States mail, prepaid on this 21<sup>st</sup> day of November, 2003, to the following:

Paul D. Post  
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Shirley Holding  
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Darcy D. Williamson  
Chapter 7 Trustee  
700 Jackson, Suite 404  
Topeka, Kansas 66603

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Debra C. Goodrich  
Judicial Assistant to:  
The Honorable Janice Miller Karlin  
Bankruptcy Judge